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No. 97-1235

Supreme Court, U. S.

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In The
Supreme Court of the United States
October Term, 1997

CITY OF MONTEREY,

Petitioner,

v.

DEL MONTE DUNES AT MONTEREY, LTD., et al.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE CITY AND COUNTY OF
SAN FRANCISCO AND 86 CALIFORNIA CITIES
AND COUNTIES AS AMICUS CURIAE IN
SUPPORT OF PETITIONER CITY OF MONTEREY

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STATEMENT OF INTEREST OF AMICUS CURIAE

Under Supreme Court Rule 37.4, amicus curiae City and County of San Francisco, joined by the 86 California cities and counties identified below, submit this brief in support of petitioner City of Monterey.¹ This case involves (1) the traditional right of a regulatory government agency to a trial by the court, rather than by a jury, to determine the agency's liability for a taking under the Fifth Amendment to the U.S. Constitution, and (2) the standard of judicial review of the decisions of administrative and legislative bodies to regulate the use of land.

With respect to the first question, the Ninth Circuit Court of Appeals held that a jury may decide the liability of a city for a taking. With respect to the second question, the Ninth Circuit eliminated the judicial deference to the decisions of local government to regulate land use, a deference that has been fundamental in our system of justice for more than 70 years. Because the availability of a jury in inverse condemnation cases and the standard of judicial review of land use regulation could have profound implications for local governments, the Court should have before it the viewpoint of these California cities and counties.

 INTRODUCTION

The decision of the Ninth Circuit represents a radical departure from the standard of judicial review of land use regulation that has prevailed under the rulings of this

¹ See cities and counties listed on previous pages.

Court for more than 70 years. The decision takes responsibility for land use policies from state and local governments that are accountable to their communities for those policies and hands that responsibility to federal juries. San Francisco and 86 California cities and counties join the City of Monterey in requesting reversal of the Ninth Circuit's decision.

In *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, the Ninth Circuit held for the first time that a plaintiff is entitled to a jury trial in an inverse condemnation case. In so holding, the Ninth Circuit misconstrued the controlling precedent of this Court. In *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 245 (1897), this Court held that there is no right to a jury trial for cases under the Takings Clause of the Fifth Amendment. At the time of this Court's decision, the application of the Takings Clause was limited to eminent domain, namely, the government's physical appropriation of land, also known as direct condemnation. Since that time, however, the application of the Takings Clause has been expanded to inverse condemnation, namely, property owners' suits from indirect takings resulting from government regulation of land use. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 122 n.25 (1978).

This Court has made clear that both direct and inverse condemnation actions arise under the Takings Clause of the Fifth Amendment. *Jacobs v. United States*, 290 U.S. 13, 16 (1933). Thus, the same rules regarding the right to a jury trial apply to both. Amici urge this Court to correct the Ninth Circuit's deviation from this Court's precedent.

In addition to affording parties the right to a jury to determine the government's liability for a taking, the Ninth Circuit erred in shifting the fundamental balance of power for land use regulatory policy between the courts on the one hand and the administrative and legislative branches of government on the other. With the exception of the narrow class of regulation that (1) allows a physical invasion of property, (2) deprives property of all economically viable use, or (3) requires the dedication of land to the public as a condition of approval of development, the decisions of this Court have uniformly held that local governmental regulation of land is entitled to a deferential standard of judicial review. Under this deferential test, the party challenging the regulation has the burden to show that the regulation does not substantially advance a legitimate state interest. Judicial deference to state land use regulation, firmly rooted in the doctrine of separation of powers, means that courts find that a land use regulation effects a taking only in the most extreme circumstances.

The decision of the Ninth Circuit changes all this. The opinion raises the standard of review of all land use regulation to heightened scrutiny. Moreover, the Ninth Circuit has shifted the burden to the public agency to demonstrate that its regulation substantially advances a legitimate state interest. As a result, the Ninth Circuit has transferred final authority over state and local land use policy – historically the province of local legislatures and administrative agencies – to federal juries.

This new scheme would create a groundswell of litigation; any disappointed applicant for a building permit

would be able to ignore the legislative and administrative forum and take the case to a court. Unless reversed, the decision will effectively nullify the state and local legislative and administrative process that has traditionally formulated land use policy.

Moreover, if upheld, the decision of the Ninth Circuit would allow a judge or jury to substitute their views as to the wisdom and efficacy of particular economic and social regulations for the judgment of legislatures, planning commissions, and city councils. In effect, judges and juries would function as zoning boards of appeals to sit in review of any land use regulation.

San Francisco and amici cities and counties respectfully request that the Court reverse this far-reaching decision.

STATEMENT OF THE CASE

The property at issue consists of approximately 37 acres overlooking the Pacific Ocean in the City of Monterey, California ("Monterey"). Beginning in 1981, the owner of the property, Ponderosa Homes, made several unsuccessful attempts to develop the property with houses.

While Ponderosa's last application to build 190 homes was pending with Monterey, respondent Del Monte Dunes at Monterey, Ltd. and Monterey-Del Monte Dunes Corporation ("Del Monte") purchased the property and pursued the application. In 1986, Monterey denied Del Monte's application.

Del Monte brought an action in the district court against Monterey for inverse condemnation, violations of its due process and equal protection rights, estoppel, and unjust enrichment. The district court held that Del Monte's constitutional claims were not ripe for review and dismissed. The Ninth Circuit reversed, finding that the constitutional claims were ripe for adjudication. *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1506 (9th Cir. 1990).

On remand, over the objection of Monterey, the district court ordered the inverse condemnation and equal protection claims tried by a jury. The district court instructed the jury that it could find Monterey liable for inverse condemnation if there was no "reasonable relationship" between Monterey's denial of Del Monte's project and a legitimate public purpose. After a trial, the jury found that Monterey was liable to Del Monte for inverse condemnation and for a violation of Del Monte's equal protection rights. The jury awarded Del Monte \$1,450,000 in damages.² The Ninth Circuit affirmed. *Del Monte Dunes v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *reaff'd on reh'g*, 127 F.3d 1149 (9th Cir. 1997) (Appendix to Monterey's Petition for Certiorari ["App."]).

² Amici cities and counties do not dispute that once liability for inverse condemnation has been established, the question of damages should be tried to a jury. See *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1092 (11th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 2514, 138 L.Ed.2d 1016 (1997); *Mid Gulf, Inc. v. Bishop*, 792 F. Supp. 1205, 1215 (D. Kan. 1992); *Warner/Elektra/Atlantic Corp. v. County of DuPage*, 771 F. Supp. 911, 913 (N.D. Ill. 1991).

ARGUMENT

I. IN ALLOWING A JURY TO DETERMINE LIABILITY FOR A TAKING, THE NINTH CIRCUIT MISCONSTRUED CONTROLLING PRECEDENT OF THIS COURT.

A. There Is No Right To A Jury In Cases Arising Under the Takings Clause.

Inverse condemnation cases arise directly out of the self-executing character of the Takings Clause of the Fifth Amendment. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315-17 (1987), citing *United States v. Clarke*, 445 U.S. 253, 257 (1980). Inverse condemnation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *Clarke*, 445 U.S. at 257. Inverse condemnation differs from direct condemnation ("eminent domain") only insofar as the action is initiated by the property owner. See *First English*, 482 U.S. at 315-17; *Agins v. City of Tiburon*, 447 U.S. 255, 258 n.2 (1980). This Court long ago acknowledged that direct and inverse condemnation stem from the same basic right:

The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment.

Jacobs v. United States, 290 U.S. at 16.

The right to a jury trial for claims under the U.S. Constitution is determined by the Seventh Amendment. The Seventh Amendment provides: "In suits at common law, . . . the right of trial by jury shall be preserved." U.S. CONST. amend VII. The Ninth Circuit determined that because an inverse condemnation action is a suit "at common law," *Del Monte* was entitled to a jury under the Seventh Amendment. But this Court has held that the Seventh Amendment merely "preserves" the right to a jury for actions for which a right to jury trial existed in 1791 when the Seventh Amendment was ratified. *Markman v. Westview Instruments*, 517 U.S. 370, 116 S.Ct. 1384, 1389, 134 L.Ed.2d 577 (1996); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 40-42 (1989); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 459-60 (1977).

When this Court first applied the Takings Clause to the States, the Court confirmed that no right to a jury trial existed for condemnation in 1791:

[B]efore the establishment of the government of the United States[,] it had been the practice in this country and in England to ascertain by commissioners, special tribunals and other like agencies, the compensation to be made to owners of private property taken for public use, and it was not to be supposed that the general provisions in American constitutions, national and state, preserving the right of trial by jury, superseded that practice. [citation omitted.]

Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. at 245; see also *Atlas Roofing Co.*, 430 U.S. at 458; *United States v. Reynolds*, 397 U.S. 14, 18 (1970), citing *Bauman v. Ross*, 167 U.S. 548,

593 (1897) (estimate of just compensation for property taken under right of eminent domain is not required to be made by a jury) and 5 JEREMY C. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 38.32(1) at 240-49 (2d ed. 1978) ("MOORE'S 2d ed.") (practical and jurisprudential history both before and after 1791 lead to conclusion that there is no constitutional right to jury trial in federal condemnation action); 8 JEREMY C. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 38.33(4)(a) at 125 (3d ed. 1997) ("MOORE'S 3d ed.") (no right to jury trial existed for takings in 1791).

Accordingly, because inverse condemnation actions are premised on the Takings Clause, and there is no right to a jury in direct condemnation actions, inverse condemnation actions also do not implicate the right to a jury trial. See *New Port Largo, Inc.*, 95 F.3d at 1092; *c.f. Department of Agric. & Consumer Services v. Bonanno*, 568 So.2d 24, 28 (Fla. 1990) (no right to jury trial for inverse condemnation under Florida Constitution because no right to jury trial for condemnation at common law). The Eleventh Circuit has adopted this view:

"We have discovered no indication that the rule in regulatory takings cases differs from the general eminent domain framework, in which issues pertaining to whether a taking has occurred are for the court, while damages issues are the province of the jury."

New Port Largo, Inc., 95 F.3d at 1092.³

³ The only other federal courts to address the issue of the right to trial by jury in an inverse condemnation case agreed with the Eleventh Circuit. See *Mid Gulf, Inc. v. Bishop*, 792 F. Supp. at 1215 (liability for inverse condemnation raises question

To find a right to a jury in an inverse condemnation case, the Ninth Circuit attempted to distinguish the rule in direct condemnation cases. Without authority, the Court reasoned that direct condemnation proceedings are not tried before a jury because the United States traditionally is a party. App. 8 (citing commentary and case law relating to Federal government's waiver of sovereign immunity to jury trial for inverse condemnation). But as shown above, the rule precluding a jury in condemnation actions is rooted in the consistent practice of our country before the adoption of the Seventh Amendment. See *Chicago, B. & Q. R. Co.*, 166 U.S. at 245; *Atlas Roofing Co.*, 430 U.S. at 458; *United States v. Reynolds*, 397 U.S. at 18; *Bauman v. Ross*, 167 U.S. at 593; 5 MOORE'S 2d ed., ¶ 38.32(1) at 240-49; 8 MOORE'S 3d ed., ¶ 38.33(4)(a) at 125.

The Ninth Circuit found a right to a jury on the liability issue because Del Monte's inverse condemnation claim raised mixed questions of fact and law and Del Monte sought a damages remedy. App. 11-15. The former reason is not relevant to the jury issue; direct condemnation cases also raise mixed questions of law and fact. See, *e.g.*, *United States v. 21.54 Acres of Land*, 491 F.2d 301,

of law to be determined by the court); *Warner/Elektra/Atlantic Corp. v. County of DuPage*, 771 F. Supp. at 913 (liability for inverse condemnation presented question for the court). The Eleventh Circuit's position is also consistent with the rule prevailing in the great majority of the 50 states. See, *e.g.*, *Hensler v. City of Glendale*, 8 Cal.4th 1, 15 (1994). Accordingly, the Ninth Circuit's rule would promote forum shopping between the federal and state courts.

306-07 (4th Cir. 1973). Yet, as demonstrated above, the unanimous and long-standing rule of this Court precludes juries in direct condemnation cases under the Fifth Amendment. As this Court stated in *Atlas Roofing Co.*: "The point is that the Seventh Amendment was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases." 430 U.S. at 460. The latter reason also is not relevant to whether the liability issue should be decided by a jury; courts have consistently treated liability for inverse condemnation differently from damages.⁴

The Ninth Circuit also found a right to a jury because inverse condemnation actions are actions "at law" rather than suits "in equity." App. 7-9. This logic fails. Direct condemnation is also a right at law; it is not a right in equity, nor a creature of statute. *Atlas Roofing Co.*, 30 U.S. at 458, citing *Kohl v. United States*, 91 U.S. 367, 375-76 (1876) (Judiciary Act of 1789 conferred upon circuit courts jurisdiction over condemnation actions). Yet, direct condemnation claims have never included a right to jury trial. *Id.*

B. Section 1983 Does Not Create A Right To A Jury.

The Ninth Circuit erroneously assumed that Del Monte was entitled to a jury trial because Del Monte brought its inverse condemnation action under 42 U.S.C.

⁴ If a court finds that the government is liable for inverse condemnation, a jury determines just compensation. See *infra* p. 5 and footnote 2.

Section 1983. App. 7-10. The Ninth Circuit's reliance on Section 1983 is misplaced.

In general, a jury is available in an action brought under Section 1983 if the plaintiff seeks money damages. See, e.g., *Perez-Serrano v. DeLeon-Velez*, 868 F.2d 30, 32 (1st Cir. 1989) (in unlawful discharge case, "where damages and injunctive relief are sought under § 1983, liability is for the jury."). However, among the rights enumerated in the Constitution, the Takings Clause is uniquely "self-executing." See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. at 315. "[I]t is the Constitution that dictates the remedy for interference with property rights amounting to a taking." *Id.* Unlike other claims for damages arising under the Constitution, the Takings Clause provides its own monetary remedy, "just compensation," obviating a remedy under Section 1983. See also *Molina v. Richardson*, 578 F.2d 846, 853 n.14 (9th Cir. 1978) ("The Fifth Amendment's explicit requirement that compensation be paid for such takings is, of course, an important factor distinguishing such actions. . . .").⁵

This Court has regarded Section 1983 as creating a remedy for "constitutional torts." See *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691 (1978). But whether a jury is available in an action brought under Section 1983 turns on whether a jury is available for infringement of the underlying constitutional right. See

⁵ But see *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992) (relying on non-takings cases, finding that takings claims against municipalities under Fifth Amendment must be brought under 42 U.S.C. § 1983).

Albright v. Oliver, 510 U.S. 266, 271 (1994), citing *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979) and *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (Section 1983 purely a remedy for violation of other federal rights; Section 1983 not a source of substantive rights); see also *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617 (1979) (Civil Rights Act of 1871 provides merely a remedy, not any substantive rights); but see *Cook v. Cox*, 357 F. Supp. 120, 123 (E.D. Va. 1973) (Section 1983 creates separate federal right that implicates right to jury trial). As demonstrated above, there is no constitutional right to a jury in a takings case. Section 1983 does not create such a right here.

The Ninth Circuit relied on *Lorillard v. Pons*, 434 U.S. 575 (1978) for the proposition that Section 1983 confers a right to a jury. App. 7. However, in *Lorillard*, the underlying right the plaintiff sought to enforce originated with the Age Discrimination in Employment Act of 1967 (ADEA). 29 U.S.C. §§ 621 *et seq.* This Court found that in creating a new legal right under the ADEA, Congress intended to incorporate the right to a jury trial that existed for enforcement of similar federal statutes as of 1967. 434 U.S. at 581, 584.⁶

In finding that a jury is available in an inverse condemnation case under Section 1983, the Ninth Circuit also

⁶ The predecessor statute to Section 1983 was enacted in 1871. At the time of its enactment, there was no right to a jury trial for condemnation actions because there was no right to a jury trial for such actions in 1791. See *supra* at pp. 7-8. The mere enactment of Section 1983 did not create the right to a jury trial for claims for which no such right existed in 1871.

misconstrued a takings action as a type of common-law tort, such as trespass. App. 9. The Ninth Circuit relied on *Beatty v. United States*, 203 F. 620, 626 (4th Cir. 1913), writ of error dismissed and cert. denied, 232 U.S. 463 (1914) (appeal denied because order not final), for the proposition that inverse condemnation is similar to trespass. However, *Beatty* was overruled in *21.54 Acres of Land*, 491 F.2d at 306-07 (trial judge had jurisdiction to find facts relative to takings claim) and *Atlantic Seaboard Corp. v. Van Sterkenburg*, 318 F.2d 455, 459 (4th Cir. 1963) ("there is no absolute right to a jury trial on the issue of compensation").

An inverse condemnation claim is not analogous to common-law torts like trespass. In cases of trespass and other common-law torts, the plaintiff sues the defendant for damages for a wrong committed by the defendant. In contrast, under the Takings Clause, the taking is not considered a wrong or an injury as long as the government pays compensation. See *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). The framers intended the Takings Clause only to apportion the burdens of public projects between the individual and the public as a whole. *Agins v. City of Tiburon*, 447 U.S. at 260 (taking is determination that public at large rather than single owner must bear burden of state's action); *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (Takings Clause designed to bar Government from forcing some alone to bear public burdens); *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945) (Takings Clause redistributes economic losses inflicted by public improvements so they fall upon public rather than individual property owners). The Ninth's Circuit's

attempt to analogize "takings" cases to common-law torts cannot work.

Significantly, reliance on Section 1983 for a right to a jury in inverse condemnation would produce anomalous results. First, as shown above, both direct and inverse condemnation claims arise directly out of the Takings Clause of the Fifth Amendment. *See supra* at pp. 6-8. It is settled that direct condemnation does not require a trial by jury. It would be incongruous to require liability issues in direct condemnation to be tried by a judge, and simultaneously allow liability for inverse condemnation to be tried to a jury.

Second, a property owner cannot sue a state under Section 1983. *Arizonans for Official English v. Arizona*, ___ U.S. ___, 117 S.Ct. 1055, 1069, 137 L.Ed.2d 170 (1997); *Quern v. Jordan*, 440 U.S. 332, 338-41 (1979). Actions for inverse condemnation against a state government are brought directly under the Fifth Amendment. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1006 (1992). Accordingly, under the Ninth Circuit's rule, a property owner would have a constitutional right to a jury in an inverse condemnation case in federal court against a local public entity, *see Monell v. Dept. of Social Services*, 436 U.S. at 690, but not against a state.

II. HEIGHTENED SCRUTINY APPLIES ONLY TO REGULATION WHERE THE GOVERNMENT REQUIRES THE DEDICATION OF A POSSESSORY INTEREST IN LAND AS A CONDITION OF APPROVAL.

A. Like Other Social And Economic Regulation, Land Use Regulation Has Traditionally Enjoyed A Presumption Of Validity.

Since the New Deal, this Court has consistently applied the lowest level of scrutiny to determine whether social and economic regulation advances a legitimate government interest. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938); *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 377 (1991) ("determination of 'the public interest' in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment, and [*Parker v. Brown*, 317 U.S. 341 (1943)] was not meant to shift that judgment from elected officials to judges and juries"); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (legislative acts adjusting burdens and benefits of economic life presumed constitutional; burden is on one complaining of constitutional violation to establish that regulation is arbitrary and irrational).⁷

⁷ In *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994), this Court made clear that heightened scrutiny applies only to adjudicatory decisions relating to specific permit applications, rather than legislative regulation. However, it is unclear from the Ninth Circuit's decision whether, in extending heightened scrutiny to decisions involving no exaction, the panel intended to limit such scrutiny to adjudicatory actions. Disappointed permit applicants will no doubt argue that heightened scrutiny

Generally, courts review land use regulation like other economic and social legislation, applying the deferential "rational basis" test. *See, e.g., Euclid*, 272 U.S. at 388 (if validity of legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control); *Zahn v. Board of Public Works*, 274 U.S. 325, 328 (1927) (court will not substitute its judgment for that of legislative body charged with primary duty to determine the question); *Berman v. Parker*, 348 U.S. 26, 32-33 (1954) (court does not sit to determine whether particular housing project is or is not desirable); *Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir. 1998) ("The Courts of Appeals were not created to be 'the Grand Mufti of local zoning boards'"); *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 828-29 (4th Cir. 1995) ("Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the federal courts"); *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995) (heightened scrutiny "limited to the context of development exactions where there is a physical taking or its equivalent."). Under this test, the

applies to legislative land use regulations as well. *See, e.g., Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995) (Thomas, J., dissenting, arguing that heightened scrutiny should apply to legislative conditions of development of real estate). For this reason, San Francisco and amici cities will assume for purposes of argument here that the Ninth Circuit's decision applies to legislative zoning regulations.

courts presume that the government's decision is supported by the facts. The courts must uphold such regulation unless no reason can be conceived to support it. *See, e.g., Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1973); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-96 (1962). The burden is on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *see also Pennell v. San Jose*, 485 U.S. 1 (1988) (ordinance to control rents upheld); *Agins v. City of Tiburon*, 447 U.S. at 261-62 (zoning to prevent ill effects of urbanization upheld); *Penn Central Transp. Co. v. New York City*, 438 U.S. 110, 129-30 (1978) (landmark preservation law upheld as valid exercise of police power); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413 (great weight given to judgment of legislature).⁸

⁸ Notably, the Ninth Circuit's radical expansion of the federal courts' power to make land use policy in *Del Monte Dunes* is at odds with other decisions of that Circuit. The Ninth Circuit has been at the forefront of the federal courts recognizing that the federal judiciary should only intervene in local zoning disputes in cases of clear abuses of power. *See, e.g., Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1455 (9th Cir. 1987) (constitutional claims not ripe because city had not made final decision regarding acceptable uses); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 409-10 (9th Cir. 1996), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1386, 140 L.Ed.2d 646 (1998) (district court should refrain from addressing federal facial taking claim under *Pullman* abstention doctrine); *Commercial Builders of Northern California v. Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992) (upholding impact fee imposed on commercial development for construction of housing); *Dodd v. Hood River County*, 136 F.3d at 1225 (deferring to state's judgment in denying building permit).

The rational basis test is firmly rooted in the doctrine of separation of powers between the legislative and administrative branches of government and the judicial branch. *Penn Central*, 438 U.S. at 125; *Gorrie v. Fox*, 274 U.S. 603, 608 (1926). The Constitution vests the legislative and executive branches with the authority to make social and economic policy.

As this Court has consistently recognized in cases involving the powers of the other branches, the Constitution limits the role of the judiciary to restraining the arbitrary exercise of legislative and administrative authority. The Takings Clause is one such limit. A public agency is liable for a regulatory taking of private property *only* where the regulation "goes too far." *Pennsylvania Coal*, 260 U.S. at 415; *First English*, 482 U.S. at 316.

B. This Court Has Limited Heightened Scrutiny To The Special Class Of Land Use Regulation Cases Where Government Requires A Dedication Of Property As A Condition Of Project Approval.

In changing the standard of judicial review of discretionary decisions affecting land use, the Ninth Circuit has strayed far from this Court's precedent. In *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), the Court developed the "essential nexus" takings test. 483 U.S. at 837. In order to condition approval of a land use development on the transfer of a possessory interest in land to the public, known as an "exaction," a governmental entity must show that the transfer "substantially advances a legitimate state interest." *Id.* at 834-37.

The phrase "substantially advances a legitimate state interest" in the context of exactions means that a condition must "serve[] the same governmental purpose as [a] development ban." *Id.* at 837. The essential nexus test also shifts to the government the burden of justifying the exaction. *Id.* at 836; *Dolan*, 512 U.S. at 391 n.8. In contrast, where the government merely regulates land use, the property owner still bears the burden of demonstrating that a regulation effects a taking. *Id.*

In *Dolan*, this Court answered "a question left open" by *Nollan*. 512 U.S. at 377. The Court quantified the *degree* of the nexus required by *Nollan* between the impact of a development project and a mitigating condition. The essential nexus test requires "rough proportionality." *Id.* at 391. Both *Nollan* and *Dolan*, however, made clear that the "essential nexus" and "rough proportionality" tests – collectively referred to as "heightened scrutiny" – apply *only* where the government has required dedications of a possessory interest in land as a condition of approval.

The *Nollan* Court found that permit conditions exacting an interest in real property resembled a physical taking. 483 U.S. at 831. The Court further acknowledged that governmentally required dedication of land as a condition of development is entirely different from classic regulation of land use. *See id.* at 834-35 (citing cases involving land use regulation for the proposition that "a broad range of governmental purposes and regulations" of land use have been upheld). Justice Scalia concluded his opinion by highlighting the distinction between use restrictions and required dedications of possessory interests:

We are inclined to be particularly careful about the adjective ["substantial"] where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.

Id. at 841 (emphasis added).

Thus, heightened scrutiny has its origins in the narrow class of regulation of adjudicatory exactions on individual permit applications allowing the physical invasion by the public of private property. In *Nollan* and *Dolan*, this Court held that heightened judicial scrutiny of this special group of cases is necessary to guard against government's "leveraging" the police power. The Court was concerned about the potential abuses of governmental power where the government imposes a condition on development that allows the government to acquire an interest in property on behalf of the public, but where the dedication of the property to the public does not bear a close relationship to the impact of the proposed project.

Dolan underscored the distinction between pure land use regulation and conditions requiring the dedication of a possessory interest in land. Chief Justice Rehnquist emphasized that the exaction in question compromised *Dolan*'s "right to exclude others," which is "'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" 512 U.S. at 384, quoting from *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); see also *Dolan*, 512 U.S. at 393. The Chief Justice defined the scope of the holdings in *Nollan* and *Dolan* as follows:

The sort of land use regulations discussed in the cases just cited [*Euclid*, *Pennsylvania Coal*, and *Agins*], . . . differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.

512 U.S. at 385.

Even in his dissent in *Dolan*, Justice Stevens pointed out that *Nollan*'s "essential nexus" test and *Dolan*'s "rough proportionality" test apply only to conditions requiring the dedication of an interest in land: "The Court has decided to apply its heightened scrutiny to a single strand – the power to exclude. . . ." *Dolan*, 512 U.S. at 409 (Stevens, J., dissenting). Plainly, a government's ordinary regulation of land use does not implicate the power to exclude and does not trigger heightened judicial scrutiny.

In the case of *Del Monte*, Monterey did not require an actual conveyance of property. Nor did the government impose a condition on the approval of a permit. Rather, this case involves ordinary regulation of land use in the form of a denial of a permit. This case does not raise the special concerns that prompted the formulation of *Nollan*/*Dolan* heightened scrutiny, namely, leveraging of

the police power to acquire an interest in land. Accordingly, the Ninth Circuit erroneously applied heightened scrutiny.⁹

C. Shifting Authority For Land Use Regulatory Policy To The Courts Would Undermine Fundamental Principles Of Political Accountability.

Expansion of heightened scrutiny to all land use regulations adopted by legislative and administrative agencies would frustrate our most basic democratic traditions. In *Sylvia Development Corp. v. Calvert County*, 48 F.3d 810, the Fourth Circuit described the essentially political nature of land use planning:

Zoning is inescapably a political function. Indeed, it is the very essence of elected zoning officials' responsibility to mediate between developers, residents, commercial interests, and those who oppose and support growth and

⁹ Land use regulation effects a taking where the regulation either: (1) fails to substantially advance a legitimate government interest, or (2) denies the property owner economically viable use of his land. *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1016. This Court first referred to the first prong of the takings test, that land use regulation must "substantially advance a legitimate government interest," in *Agins*, 447 U.S. at 260. In establishing this standard, the *Agins* Court relied on a substantive due process case, *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1927). *Agins*, 447 U.S. at 260. Accordingly, the "substantially advances" standard had its origins in the doctrine of substantive due process. In takings cases not involving exactions of a possessory interest in land, therefore, the same deferential standard of judicial review that applies to substantive due process cases – namely, the rational basis test – should apply.

development in the community. . . . [L]and-use decisions are a core function of local government. . . . Federal courts should be extremely reluctant to upset the delicate political balance at play in local land-use disputes.

48 F.3d at 828, quoting *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63, 67-68 (4th Cir. 1992). Local land use planning "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." *C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983), quoting *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 498 (1941).

The elected representatives serving on amici's city councils and boards of supervisors are accountable to their constituents for the zoning and land use ordinances that these elected officials enact. These elective bodies, and the boards and commissions appointed by these bodies that administratively apply the zoning ordinances and general plans to individual permits, are also accountable to the people. Indeed, administrative and legislative proceedings where these policies are considered and applied provide an essential forum for members of the public affected by a development project to express their views to their elected representatives.

Critically, the universal application of heightened scrutiny ~~proposed by the~~ Ninth Circuit would take the authority over land use policy traditionally vested in elected bodies and place ultimate power in the hands of judges and juries. The effect would be to deny a meaningful voice in matters that have direct and immediate impact on their property values, safety, economic welfare,

and quality of life. The framers of the Constitution could not possibly have intended this result.

D. Transferring Authority For Land Use Policy To The Courts Would Cripple The Ability Of Local Government To Engage In Land Use Planning.

The transfer of authority over land use policy to the courts that would result if the Ninth Circuit's decision is upheld would not only undermine basic principles of accountability, but would also devastate the existing system by which local governments endeavor to make our communities safe, clean, well-planned, and attractive, thereby helping to make our businesses competitive. Several examples illustrate the point.

First, in Silicon Valley, located on the Peninsula south of San Francisco, industrial success has been accompanied by complex problems, such as a shortage of housing, congested traffic, and other environmental hazards. See JOINT VENTURE SILICON VALLEY NETWORK, BENCHMARKING SILICON VALLEY'S ECONOMIC VITALITY AND QUALITY OF LIFE (1997).¹⁰ These ills threaten to stifle job growth and reduce prosperity for people in the San Francisco Bay

¹⁰ The vision of Joint Venture Silicon Valley is "to build a community collaborating to compete globally." PAMPHLET, JOINT VENTURE SILICON VALLEY (1996) ("*JVSV Pamphlet*") at 1. Joint Venture Silicon Valley is comprised of CEO's from high-technology firms and the construction industry, government, education and the community "who have joined together to act on regional issues affecting economic vitality and quality of life." *Id.*

Area. As the Joint Venture Silicon Valley Network has reported, the "affordability, variety, and location of housing affect a region's ability to maintain a viable economy . . .," "[c]ongested roads reduce productivity," and the "availability of public transit . . . provides non-auto workers access to job opportunities." *Id.* at 16, 19; see also PRESS RELEASE, ASSOCIATION OF BAY AREA GOVERNMENTS (ABAG) Dec. 11, 1997, at 4 ("High housing prices and production of [affordable] housing will remain the most serious constraint to the economic health of the region"); BAY AREA FUTURES, ABAG STUDY FOR SAN FRANCISCO DISTRICT COUNCIL AND URBAN LAND INSTITUTE (Nov. 1997) at 38 (long commutes and lack of access to mass transit threaten economic vitality of region), 41 (Bay Area traffic forecast appears "grim").

In reaction to these social problems, the region has developed strategic plans to manage growth, while simultaneously achieving a balance between the rights of property owners and the interests of the community. These solutions require the coordination of governmental agencies throughout the region.

Under existing California law, a development project that would increase traffic congestion in Silicon Valley would require an environmental impact report and undergo a series of public hearings. In this public review process, planners with experience and expertise in the transportation issues raised by the project would study the project and make recommendations to the decision-maker, such as a planning commission or city council. With input from the public, the decision-maker would review the project for harmony with local and regional

zoning ordinances and transportation plans. If the project is inconsistent with these ordinances and plans, the decision-maker could disapprove the project or condition approval on the developer's mitigation of the harmful impacts of the project on the region's transportation systems.

However, under the expansion of heightened scrutiny mandated by the Ninth Circuit, once this administrative process is completed, the developer could challenge a denial of the project or any condition imposed on the project by filing a takings claim in court. The court's review of the project would be essentially *de novo*. The decisions made by planning commissions and city councils – decision-makers committed to enforcing local and regional planning and zoning laws, and who have reviewed a thorough study of the proposed project for compliance with policies adopted by democratically elected officials – would be entitled to no deference. Instead, a judge or lay jury without experience in local planning and zoning matters would have the final say on the project.

These judges and juries do not report their decisions to the citizens of Silicon Valley affected by the project.¹¹ Under heightened scrutiny, judicial decision-makers

¹¹ In the case of Del Monte Dunes, jurors deciding the fate of property in the City of Monterey could be drawn from as far away as Ukiah in Mendocino County – 200 miles away. The views of such persons having no familiarity with the Monterey Coast would thus become a more significant factor in the decision ultimately to approve or disapprove the development than all of the various local and regional plans, local and state zoning ordinances, and applicable case law.

would be free to re-weigh the evidence and substitute their own, subjective views as to the advantages and disadvantages of the project, giving no deference to the exhaustive public review process. Decisions about land-use and transportation planning would be made on an *ad hoc* basis by different decision-makers in every case. Because the subjective views of a judge or jury would be the ultimate determinant of land use regulation, consistency and predictability in community planning would be lost.¹² Moreover, a judge or jury sitting in review of a single development project is not apt to apply the broader perspective necessary to achieve solutions to regional problems.

A second example involves the ability of local communities to restrict adult businesses to districts that are removed from schools, churches, and other business catering to children and families – one of the quintessential prerogatives of local governments. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986) (cities may regulate adult theaters through zoning by dispersing or concentrating them); *Miller v. California*, 413 U.S. 15 (1973) (standard for definition of pornography is contemporary local community standard). Under a system in which heightened scrutiny were universally applicable, courts would no longer defer to the decisions of elected public officials over policies for siting adult businesses.

¹² One of the primary objectives of Joint Venture Silicon Valley is to "[p]romote[] consistency and simplification of the regulatory and permitting processes in Silicon Valley." JVSC Pamphlet at 2.

As a third example, the rule adopted by the Ninth Circuit would subject zoning ordinances setting height limits, set-backs, side-yards, off-street parking, and seismic safety to general attack. Under heightened scrutiny, the government would be required to make an individualized showing for each restriction on each building permit application that the regulation was justified to avoid a social harm in that particular case. Moreover, judges and juries would be free to substitute their own judgment for that of the administrative or legislative agency as to the basic policy underlying a land use regulation. Virtually all planning and zoning would be vulnerable to challenge as a taking.

In sum, the expansion of heightened scrutiny would threaten the separation of powers between the administrative and legislative branches of government and the judicial branch, undermine our democratic system with respect to regulation of land use, and cripple the efforts of government to plan our communities. As this Court intended in deciding *Nollan* and *Dolan*, heightened scrutiny should be limited to the narrow, special class of adjudicatory exactions involving a possessory interest in land.

CONCLUSION

The decision of the Ninth Circuit should be reversed.

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Respectfully submitted,

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